No. 767.

Brf. of Rose for D. E. (on mo.)

Office Supreme Court U. S.
FILED
APR 17 1899
JAMES H. McKENNEY,
Clerk.

Filed April 17, 1899.

Supreme Court of the United States,

No. 767, October Term, 1898.

SAMUEL NELSON,
Plaintiff in Error,
against
DENNIS MOLONEY,
Defendant in Error.

Brief for Defendant in Error on Motion to Dismiss or Affirm.

KELLOGG, ROSE & SMITH,
For Defendant in Error.

ABRAM J. ROSE,
Of Counsel.

In the Supreme Court of the United States.

No. 767, October Term, 1898.

Samuel Nelson,
Plaintiff in Error,
against
Dennis Moloney,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is a motion to dismiss the writ of error allowed by Mr. Justice Peckham to review the judgment entered in this action on the 6th day of March, 1899, in the office of the Clerk of the Supreme Court of the State of New York, upon the remittitur of the Court of Appeals of that State, affirming the decision below and directing final judgment for the foreclosure of a mortgage given by the plaintiff in error to the defendant in error, which was the subject of the action.

PLEADINGS.

This action was brought by the defendant in error to foreclose a mortgage on real estate for $10,000, given by the plaintiff in error on the 13th day of October, 1891, as security for a bond of even date.

The complaint is the usual one in an action to foreclose a mortgage.

See Complaint, Record, pages 3-6.

The answer of the plaintiff in error alleges the commencement of an action by the defendant in error against him to foreclose the mortgage in suit prior to the commencement of this action, in which first action final judgment had been rendered, which judgment is *res adjudicata* between the parties and a bar to this action. Also that the bond and mortgage in suit were without consideration and illegal and void on grounds of public policy.

See Answer, Record, pages 7-9.

FACTS.

Prior to the 16th day of October, 1891, one Thomas O'Brien had been indicted by the Grand Jury of Albany County for the crime of grand larceny, and on his arrest was held to bail to answer such indictment in the sum of $10,000.

The defendant in error, a resident of the State of New York, became bail with the plaintiff in error, then a resident of the State of New York, for the appearance of O'Brien (Record, pages 42-43).

To indemnify Moloney against loss by going bail for O'Brien, the bond and mortgage in suit were drawn up and

executed by the plaintiff in error and delivered to the defendant in error. The condition of the bond was that the same should be void if O'Brien should appear to answer the charge of grand larceny in whatever court he might be prosecuted for said crime, and should render himself amenable to the process of the court, and, if convicted, appear for judgment pursuant to the bail bond hereinbefore mentioned.

See Bond, Record, page 43.

The cause of the People *v.* O'Brien was called in the County Court. O'Brien did not appear and his bail was duly forfeited.

See Record, page 20.

Thereafter suit was brought against the plaintiff in error, and the defendant in error, on the recognizance, and judgment rendered against them, for the sum of $10,000 and costs.

See Record, page 20.

Execution on said judgment was thereafter issued and by a sale of Moloney's property thereunder, he paid the full amount thereof, amounting to the sum of $10,799.19.

See Record, page 45.

The plaintiff in error has paid nothing, nor did he have any property out of which the execution could be satisfied.

Prior to the commencement of this action, another suit had been brought by Moloney against Nelson upon the bond and mortgage sought to be foreclosed in this action, in

which the Trial Court gave Moloney a judgment, but upon an appeal taken to the General Term of the Supreme Court, the judgment was reversed on the ground that the suit had been prematurely brought, inasmuch as it was brought before Moloney had paid anything on account of the judgment entered on the forfeiture of the criminal recognizance.

This decision may be found reported in the official Supreme Court Reports.

Moloney *v.* Nelson, 70 Hun, 202.

From the judgment of the General Term an appeal was taken by Moloney to the Court of Appeals of the State of New York, with the usual stipulation required in cases where appeals are taken from a judgment of reversal and ordering a new trial, to the effect that if the judgment appealed from was affirmed, judgment absolute might be rendered against him on the stipulation.

The Court of Appeals affirmed the judgment and directed judgment absolute against Moloney.

The opinion of the Court in that case, written by Mr. Justice Peckham, is reported in Moloney *v.* Nelson, 144 N. Y., 182.

After the rendition of the judgment of the Court of Appeals, this action was commenced, the defendant in error having in the meantime satisfied the judgment entered on the forfeited bail bond.

Testimony Moloney, page 20; Executions, page 45.

Before the beginning of this action Nelson had transferred the property covered by the mortgage to the defendant, Albert J. Adams, who, at the time of the com-

mencement of the action, had the record title (page 16). Adams was a resident of New York State (page 54).

The Trial Court gave judgment in Moloney's favor, directing the sale of the mortgaged premises.

From that judgment Samuel Nelson alone appealed to the Appellate Division of the Supreme Court of the State of New York, in the First Department, which Court affirmed the judgment.

No appeal therefrom was taken by Adams or any of the other defendants.

The Appellate Division affirmed the judgment, and from the judgment of affirmance entered upon the order of the Appellate Division an appeal was taken by Nelson to the Court of Appeals.

The only questions which were raised in the said Court of Appeals by the plaintiff in error were:

1st. That the stipulation given by Moloney on the appeal to the Court of Appeals in the first action brought to foreclose the mortgage was a bar to the recovery in the action then before the Court.

2d. That the bond and mortgage having been given to indemnify bail in a criminal case, they were void, because contrary to public policy.

No Federal question is presented by the Record, nor was any such question argued before the Court of Appeals of the State of New York.

ARGUMENT.

POINT I.

This Court has no jurisdiction, because no Federal question was presented in the State Court for decision or review.

FIRST.—This action was brought simply to foreclose a mortgage on real estate, situated within the City, County and State of New York.

The only questions raised by the plaintiff in error upon the trial, and relied upon on his appeal to the Court of Appeals of that State, are stated in the opinion of Chief Justice Parker, to be:

"1. The stipulation given by the plaintiff on the appeal to (the Court of Appeals) in a prior action brought to foreclose the mortgage, is a bar to the recovery in this action.

2. The bond and mortgage having been given to indemnify plaintiff in a criminal case, they are void, because contrary to public policy."

See Opinion Moloney *v.* Nelson, 158 N. Y., 351.

SECOND.—As to the first question, the Court, speaking by Chief Justice Parker, said: "The defendant recognizes the existence of the rule that where the plaintiff has been defeated in an action because he brought it prematurely, the judgment entered therein is not a bar to a subsequent suit brought after the right of action has accrued (Converse *v.* Sickles, 146 N. Y., 200–207; Rose *v.* Hawley, 141 N. Y., 366), but insists that the stipulation given on the appeal to the Court of Appeals from the order of the General Term, operates to prevent a recovery. This contention is without support in authority or reason."

As to the second contention the Court treated the question as follows: "As to the second ground relied upon to defeat the action, viz., that the bond and mortgage were void as against public policy, the question is an open one in this State, so far as decision is concerned, but the view of this Court was expressed in Moloney *v.* Nelson (144 N. Y., 182). The Court said: 'This leaves it unnecessary to consider the other defenses set up in the answer of the defendant Nelson, although we must say that the claim that the defendant's contract was void as against public policy does not impress us as being a good defense, at least, in this State.' It is true that in some other jurisdictions, as is pointed out in the very careful opinion of the Appellate Division, it has been suggested, if not decided, that it is against public policy to allow bail to become indemnified, the reason given being that the object for which the bail is required is to assure the appearance of the prisoner to answer the charge against him, and that necessarily the bail had a direct pecuniary interest in preventing the escape of the prisoner, which he would not were he fully indemnified.

That is not the public policy of this State; for the giving of bail in criminal cases is regulated by statute, and the Legislature has, by its provisions, provided that a personally responsible surety may be altogether omitted if the accused prefers to make a deposit of money; he may have his choice either to give a bond with sureties, or make a deposit of money. It is the loss of the money deposited or the assurance that the sureties will be obliged to pay the amount of the bail that is relied upon to secure the presence of the accused.

It, therefore cannot be said to be a part of the public policy of this State to insist upon personal liability of sureties, for there need not be such personal liability in any

case if the accused make a deposit of money in lieu of bail, as provided by the statute."

Moloney *v.* Nelson, 158 N. Y., 351.

It is obvious, then, that the only questions presented to the Court for review were:

1st. A question relating wholly to the effect of a stipulation prescribed by the State Legislature upon an appeal from an order of the Appellate Division of the Supreme Court in that State reversing a judgment and ordering a new trial.

2d. A question as to the public policy of the State of New York respecting the indemnification of bail in criminal cases.

THIRD.—As the validity of no treaty or statute of or authority exercised under the United States, nor of a statute of or authority exercised under any State, was drawn in question, it is essential to the maintenance of the jurisdiction of this Court that it should appear that some title, right, privilege or immunity under the Constitution or laws of the United States was especially set up or claimed in the State Court, and that the decision of the highest court of the State in which such decision could be had *was against the title, right, privilege or immunity so set up or claimed.*

Chief Justice Fuller, in that regard, said that certain propositions must be regarded as settled.

"1. That the certificate of the presiding Judge of the State Court as to the existence of grounds upon which our interposition might be successfully invoked, while always

regarded with respect, cannot confer jurisdiction upon this Court to re-examine the judgment below. Powell *v.* Brunswick Board of Suprs., 150 U. S., 435–439, and cases cited.

2. That the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper manner. Miller *v.* Texas, 153 U. S., 535; Morrison *v.* Watson, 154 U. S., 111–115, and cases cited.

3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. Loeber *v.* Schroeder, 149 U. S., 580–585, and cases cited.

4. That the petition for the writ of error forms no part of the record upon which action is taken here. Butler *v.* Gage, 138 U. S., 52 and cases cited.

5. Nor do the arguments of counsel, though the opinions of the State courts are now made such by rule. Gibson *v.* Chonteau, 75 U. S., 8 Wall., 314; Parmalee *v.* Lawrence, 78 U. S., 11 Wall., 36; Gross *v.* U. S. Mortgage Co., 108 U. S., 477–484; U. S. *v.* Taylor, 147 U. S., 695–700.

6. The right on which the party relies must have been called to the attention of the Court in some proper way and the decision of the Court must have been against the right claimed. Hoyt *v.* Thompson, 66 U. S., 1 Black, 518; Maxwell *v.* Newbold, 59 U. S., 18 How., 515.

7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved, so that the State court could not have

given judgment without deciding it; that is—a definite issue as to the possession of the right must be distinctly deducible from the record, before the State Court can be held to have disposed of such Federal question by its decision. Powell *v.* Brunswick Co. Bd. of Sprs., 150 U. S., 435–439."

Saywood *v.* Denny, 158 U. S., 180.

It is respectfully submitted that "Tested by these principles," as said by Mr. Chief Justice Fuller in the Saywood case (*supra*), "it is quite evident that this writ of error must be dismissed."

1st. Because no title, right, privilege or immunity under the Constitution or laws of the United States was specifically set up or claimed by the plaintiff in error in the State Court.

2d. Because the right, if any, on which the plaintiff in error purports to rely, was not called to the attention of the State Court, nor was the decision of that court against the right claimed.

3d. Because it appears by the record that no Federal question was directly involved, and no definite issue as to the possession of the right is deducible from the record before the State Court.

POINT II.

No jurisdiction to review the judgment of the State Court is conferred by reason of the diverse citizenship of the parties, even if it existed.

As pointed out in the decision in the Saywood case (*supra*), it is settled that the petition for the writ of error forms no part of the record upon which action is taken by this Court, but if the petition be referred to, it will be found that the only ground upon which the plaintiff in error claims the right to a review of the judgment of the State Court is "by reason of diverse citizenship of the appellant and respondent."

The statute allowing the removal of causes from the State courts to the courts of the United States points out specifically the method to be pursued by a party entitled to such removal and desiring to avail himself of that privilege. Diverse citizenship alone is no ground for removal to this Court for the review of a judgment by a State court.

As a matter of fact, although it does not appear by the Record, the plaintiff in error filed his petition and bond for removal of this cause from the Supreme Court of the State of New York to the United States Circuit Court for the Southern District of New York on the ground that, at the time of the commencement of the action, he was a citizen of New Jersey, and the defendant in error, the plaintiff therein, was a citizen of the State of New York.

In granting a motion to remand the cause to the State Court, on the ground that there was no separable controversy between citizens of different States, Moloney and the defendant Adams, the holder of the record title, both being residents of the State of New York, Circuit Judge Lacombe

wrote the following memorandum of opinion: "The propriety of the removal is to be tested by the bill, not by the individual defenses to it. In a suit to foreclose a mortgage the original mortgage debtor and the subsequent purchaser of the property are both necessary parties and the controversy is not separable. (Ayers *v.* Wiswall, 112 U. S., 187.) As Adams, the subsequent purchaser, is a citizen of the same State as complainant, the cause must be remanded. May 11, 1895. E. H. Lacombe, U. S. Circuit Judge."

It is well settled that this Court cannot review the order of the Circuit Court remanding cause to the State Court.

Ill. Central R. R. Co. *v.* Brown, 156 U. S., 386.

Powers *v.* Chesapeake and Ohio R. R. Co., 169 U. S., 92.

Nor is the plaintiff in error aided by the decision of this Court in Powers *v.* Chesapeake and Ohio R. R. Co. (*supra*). That case holds simply that making a defense in a State Court after that Court has declined to surrender jurisdiction of the case, does not defeat the defendant's right to insist that the case has been lawfully removed into the Circuit Court of the United States, where the objection to jurisdiction of the State Court is saved upon the Record.

In the case at bar, the State Court did not decline to surrender jurisdiction, but on the contrary, the record was returned to the United States Circuit Court, and that Court, upon motion, remanded the case to the State Court, on the ground that there was no separable controversy wholly between citizens of different States. Besides, in the case at bar, no objection to the jurisdiction of the State Court is saved upon the Record. Even if, then, the Record showed

a case properly removable under the United States Statutes, there is no jurisdiction in this Court to review the judgment of the State Court.

POINT III.

It is manifest the writ was applied for for delay only.

This action has been pending since the 28th day of January, 1895, a period of over four years.

The defenses interposed in the State Court were purely technical and did not go to the merits.

As to the defense of *res adjudicata* by reason of the stipulation given in the first action, the Court of Appeals characterized the contention as "without support in authority or reason."

As to the defense based on the contention that the bond and mortgage were void for public policy, the Court of Appeals, in the first action, said that it "does not impress us as being a good defense, at least in this State."

It may properly be said, therefore, that in insisting upon those defenses in the State Court the purpose of the plaintiff in error was simply delay.

The resort to the extraordinary remedy of a review by this Court in such an action in which such defenses only were relied upon to defeat recovery needs no comment.

It is obvious that the plaintiff in error thus seeks to further hamper and delay the ends of justice and by some misstatement or the suppression of the facts, has been able to obtain a writ of error and bring this case to this Court.

The defendant in error has suffered actual loss by the delay, as the mortgaged property was advertised for sale and

additional expense has been incurred by reason of the postponement made necessary by the act of the plaintiff in error.

The present case seems to be eminently one for the imposition of damages authorized by the rules of this Court, where it is manifest that the writ was applied for solely for the purpose of delay.

POINT IV.

The writ of error should be dismissed and the judgment affirmed with the award of such damages as to this Court may seem just

Respectfully submitted.

ABRAM J. ROSE,
Counsel for Defendant in Error.